

LEWAL PARTNERSHIP,

Petitioner

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BEFORE THE ZONING BOARD

OF HOWARD COUNTY

Zoning Board Case No. 1094M

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DECISION AND ORDER

On January 25, 2012, the Zoning Board of Howard County, Maryland ("Board") considered the petition of Lewal Partnership to amend the Zoning Map of Howard County to reclassify from the R-20 (Residential: Single) District to the B-1 (Business: Local) District, 3.564 acres of land (the "Property") located on the south side of U.S. 40, approximately 900 feet west of Plumtree Drive, identified as Tax Map 24, Grid 4, Parcel 77, 9525 Baltimore National Pike, in the Second Election District of Howard County, Maryland.

The notice of hearing was advertised, the Property was posted with notice of the hearing, and the adjoining property owners were mailed notice of the hearing as evidenced by the certificates of posting, advertising, and mailing to adjoining property owners which were entered into the record. Pursuant to the Zoning Board's Rules of Procedures, all reports and official documents pertaining to the petition, including the petition, the Technical Staff Report of the Department of Planning and Zoning ("DPZ"), and the Planning Board's Recommendation, were entered or incorporated into the record of the hearing. Both DPZ and the Planning Board recommended approval of the petition.

Petitioner was represented by Sang Oh, Esquire. Eileen Powers, Esquire, Zoning Counsel, appeared pursuant to Section 16.1000 of the Howard County Code to support the comprehensive zoning of the Property. Several residents appeared in opposition to the proposed

rezoning. The Board conducted a hearing on January 25, 2012. A list of exhibits introduced into the record at the January 25 hearing is attached to this Decision and Order.

After careful evaluation of the evidence, the Board makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Board finds as follows with respect to the history of the Property's zoning and development:

a. The 3.564-acre Property was zoned R (Residential) in the 1954 Comprehensive Zoning. In the 1961 Comprehensive Zoning, the Property was zoned R-20, a classification that was continued in the 1977, 1985, and 1993 Comprehensive Zonings.

b. On February 27, 2001, the Howard County Board of Appeals granted Petitioner a special exception (currently referred to in the Zoning Regulations as a "conditional use") to construct and operate a Group Care Facility ("Facility") on the Property (BA 99-22E). Under the special exception, Petitioner was permitted to develop the Facility for the purpose of providing shelter, meals, and personal services for a maximum of 96 persons, 62 years or older.

c. On February 13, 2003, the Board of Appeals issued an Order extending the time periods for (1) obtaining a building permit to construct the Facility to February 27, 2005, and (2) completion of substantial construction of the Facility to February 27, 2006. *See* Petitioner's Exh. 1. Petitioner had requested extensions of time pursuant to Section 131.I.3. of the Howard County Zoning Regulations, which provides that a

conditional use shall become void unless a building permit is issued within two years and substantial completion occurs within three years from the date of the Decision and Order.

d. On or about March 28, 2003, Petitioner entered into a developer agreement and, thereafter, constructed a number of improvements to the Property, including a paved ingress/egress onto U.S. 40, sidewalks, and water and sewer line connections. Petitioner's Exhibit 3 is a satellite photograph of the Property from 2004 evidencing the visible nature of the entrance and sidewalk improvements. It is undisputed that in 2004, the Property appeared to be undergoing development.

e. In the 2004 Comprehensive Zoning, Petitioner did not request rezoning of the Property and the Property remained R-20.

f. Mr. Antonucci, a representative of Petitioner, testified that Petitioner has not, to date, constructed a Facility on the Property, nor developed the Property under the R-20 zoning classification. Mr. Antonucci stated that, despite meeting with five to six operators, Petitioner was unsuccessful in negotiating an agreement with any operator. Mr. Antonucci stated that Petitioner did not request rezoning of the Property in 2004 because he was still hopeful at that time regarding Petitioner's ability to find an operator. Mr. Antonucci testified that, in his opinion, the market for Group Care Facilities is saturated in Ellicott City and there is no demand to operate a Facility on the Property.

g. On February 10, 2011, DPZ informed Petitioner by letter that it had failed to obtain a building permit for the Facility. As a result, all approvals for the Facility, including the special exception granted by the Board of Appeals in 2001, have become void.

h. Currently, Petitioner may only develop the Property with uses permitted as of right in the R-20 District. Mr. Antonucci testified that Petitioner is permitted to build two single-family detached dwellings on the Property. Mr. Antonucci does not believe residential is a viable use for the Property. According to Mr. Antonucci, Petitioner has considered but ruled out all of the other permitted uses in R-20 for the Property.

2. The zoning and development history of neighboring properties is set forth in the Technical Staff Report of DPZ and is undisputed. The Property is bordered on its east side by an unimproved right-of-way for Arcadia Drive, which is zoned R-20. Parcel 577, which is to the immediate east of the unimproved right-of-way, is zoned B-1 and is improved with a commercial building that fronts to U.S. 40. Parcel 577 has the same zoning history as the Property up to and including the 1977 Comprehensive Zoning. In the 1985 Comprehensive Zoning, a 1.6 acre portion of Parcel 577 was rezoned to B-1, however, a 0.323 acre area along the south side of the parcel remained R-20. In 1988, the Zoning Board (in ZB 847M) granted a petition to adjust the zoning district line to include the 0.323 acre portion of Parcel 577 in the B-1 District. The B-1 zoning Parcel of 577 was continued in the 1993 and 2004 Comprehensive Zonings.

The Property is bordered on its west side by Parcel 777, which is zoned R-20. Parcel 777 is improved with a community swimming pool. There is a stream that runs along the common lot line. Parcel 777 has a wooded area immediately adjacent to the stream. All other adjacent properties are zoned R-20 and improved with single-family detached dwellings that front to Arcadia Drive or Nanmark Court.

3. Robert Vogel, a licensed civil engineer for the past twenty-five years with experience in zoning and development in Howard County, testified on behalf of Petitioner. Mr. Vogel further described the Property and its existing improvements. According to Mr. Vogel,

the Property has an existing right in entrance from a deceleration lane on U.S. 40, as well as a right out exit into the same deceleration lane. The Property is graded and has sidewalk and utility improvements.

4. Mr. Vogel testified that the Property's sole means of access is U.S. 40. Arcadia Drive terminates behind the Property. While an unimproved right-of-way for Arcadia Drive borders the east side of the Property and could provide access to U.S. 40 and the Property in the event it were developed, Mr. Vogel understands from attending community meetings that neighboring residents oppose development of unimproved Arcadia Drive and connecting it to U.S. 40.

5. Mr. Vogel described the Property's environmental features. The 3.564-acre Property contains 2.11 acres of environmental features, *i.e.*, forest conservation easements, streams, and floodplains and all of the buffers associated with those features. The Property's environmental features leave a development envelope of 1.44 acres.

6. Mr. Vogel opined that the County Council mistakenly zoned the Property R-20 in the last comprehensive zoning. According to Mr. Vogel, it would not have been obvious to the Council in 2004 that the Property should be examined for rezoning, given the visible improvements that Petitioner was making to the Property at that time. Moreover, the Council was unaware, nor could they have possibly known at the time of the last comprehensive zoning, that Petitioner would be unable to develop the Property as a Group Care Facility. Mr. Vogel believes that had the Council known of these subsequent events, it would have looked at the Property for rezoning.

7. Mr. Vogel noted that in Forest Venture II, LLC, ZB 1084M, the Zoning Board agreed with DPZ that direct access to U.S. 40 is an atypical condition for most residentially-

zoned properties in the Route 40 corridor and caused the property in that case to be unsuitable for the uses permitted in the R-20 District. The Zoning Board also agreed with DPZ that the Forest Venture property was unique in its orientation to Route 40 and its isolation from adjoining residential properties, which gained access from Frederick Road. Mr. Vogel testified that like the property in Forest Venture, Petitioner's Property is zoned R-20, has its sole means of access from U.S. 40, is isolated from adjoining residential properties because of its topography and orientation to U.S. 40, and adjoins residential properties that are oriented to and gain access from other roads.

8. Mr. Vogel does not believe that R-20 development is viable as a result of the Property's unique aspects described above. Substantial noise walls to reduce noise to acceptable County requirements would be required of any new development and Mr. Vogel does not, in any event, believe that building single-family detached dwellings that front to U.S. 40 is acceptable residential development in today's world.

9. Mr. Vogel testified regarding Petitioner's documented site plans A and B. Petitioner is requesting approval of both plans. The plans illustrate and Mr. Vogel stated that the distance from the development to the nearest home is approximately 217 feet. The Property's existing environmental features will serve as a significant buffer for the residences, as will the Property's existing wooded area along its southern border. *See* Petitioner's Exhs. 4A-C. Nevertheless, Petitioner plans to plant evergreens in order to provide additional buffering along the Property's southern lot line.

Mr. Vogel testified that the documented site plans were developed in accordance with the Route 40 Design Manual. Documented site plan A proposes a 5,000 square foot restaurant with a drive-through lane and a 2,200 square foot retail building; documented site plan B proposes a

2,900 square foot restaurant and a 6,600 square foot medical/retail building. On both plans, walkways are heavily landscaped, creating a lawn environment comfortable for walking. Mr. Vogel believes that implementation of the plans will help to energize the U.S. 40 corridor.

10. Shellie Curry, a licensed architect and the owner of Curry Architects, testified on behalf of Petitioner regarding design elements of the proposed development. Mr. Curry discussed color renderings and photographs depicting buildings, plantings, and lighting. *See* Petitioner's Exhs. 9-13. According to Mr. Curry, lighting will be provided using LED lights with deep wells.

11. The owner of the commercial strip mall to the east of the Property and four residents of the neighborhood to the south of the Property appeared as Protestants: Nello Caltabiano, 9469 Baltimore National Pike, Andrea Kolp, 9559 Westwood Drive, Tina Fullarton, 3413 Rolling View Court, Thomas J. Moloney, 3418 Rolling View Court, and Bob Doyle, 3431 Arcadia Drive. Protestants expressed several common concerns, including the impact of commercial development on the neighboring pool property to which some of them belong and the possible proliferation of commercial development as a result of any rezoning. Mr. Caltabiano, who owns the commercial strip mall to the east of the Property, expressed concern regarding his current vacancy rate and the impact of additional retail development on his own property. Protestants, along with Zoning Counsel, commonly argued that Petitioner had failed to sufficiently demonstrate mistake in the last comprehensive zoning.

12. The Board, however, is persuaded that the evidence amply demonstrates that R-20 zoning of the Property in the 2004 Comprehensive Zoning was, indeed, a mistake. Mistake may be "established by showing that events occurring subsequent to the comprehensive zoning have proven that the Council's initial premises were incorrect." Moreover, the "Court [of Appeals]

has held that when the assumption upon which a particular use is predicated proves, with the passage of time, to be erroneous, this is sufficient to authorize a rezoning.” *Boyce v. Sembly*, 25 Md. App. 43, 51 (1975) (quoting *Rockville v. Stone*, 271 Md. 655, 662 (1974)). Here, it is undisputed that the Council’s assumption that the Property would be developed as a Group Care Facility in accordance with its 2001 special exception has proven to be erroneous with the passage of time. Despite efforts to develop the Property as a Facility, Petitioner has been unable to do so. Given the Property’s unique topographical features, its sole access via U.S. 40, and its isolation from adjoining residential properties, the Board finds that the Council would have undoubtedly considered the Property for rezoning if it had known that the Property would not successfully develop under its conditional use. Accordingly, Petitioner has presented strong evidence of mistake overcoming the presumption of validity accorded to the R-20 zoning of the Property in the 2004 Comprehensive Zoning.

13. Having found that Petitioner has adequately demonstrated mistake during the 2004 Comprehensive Zoning, the Board finds that B-1 is the most appropriate zoning classification for the Property. The Board agrees with Mr. Vogel that the Property’s orientation to Route 40 and its access therefrom, its isolation from adjoining residentially improved properties, as well as the Property’s significant environmental features make it best suited for B-1 zoning and development. B-1 zoning is consistent with the use of neighboring properties that front to U.S. 40 in the surrounding area. Moreover, B-1 zoning will be an appropriate transition between the residential development to the west and the commercial development to the east along U.S. 40.

14. The Board must evaluate whether documented site plans A and B satisfy the standards for approval of documented site plans under Section 100.G.2.d. of the Zoning

Regulations. So that the Board may find that Petitioner's proposed development is compatible with nearby residential uses, as required by Section 100G.2.d.(1), the Board determines that it is necessary to apply the following additional requirements to documented site plans A and B:

- a. Petitioner shall develop a landscaping plan that includes plantings and provides buffering for adjacent residentially-zoned and improved land;
- b. Noise generated by speakers for drive-through service lanes shall not be audible from improved residentially-zoned land;
- c. All lights must be directed down and away from improved residentially zoned land; and
- d. To the extent consistent with other laws and regulations, Petitioner shall provide a buffer of 150 feet long and fifteen feet wide consisting of shade and evergreen trees, beginning on the northwest corner of the Property and along Parcel 777, which is improved with a community swimming pool.

15. The Board finds that documented site plans A and B as supplemented by the Board in Paragraph 14, satisfy all of the standards for approval of documented site plans under Section 100.G.2.d. of the Zoning Regulations. As the documented site plans illustrate and Mr. Vogel convincingly testified, residentially improved properties will be adequately buffered from commercial uses on the Property by existing environmental features. The additional buffering, noise, and light requirements imposed by the Board in this Decision and Order will ensure compatibility with adjoining residential uses, as required by Section 100.G.2.d.(1) of the Zoning Regulations. Additionally, the Board finds that Petitioner has satisfied the remaining standards for approval of documented site plans for the reasons stated in Section IV.D. of the Technical

Staff Report of DPZ. In this regard, the Board accepts the evaluation by DPZ as correct and expressly adopts it as its own.

CONCLUSIONS OF LAW

1. Petitioner, as one seeking a piecemeal zoning reclassification, has the burden of demonstrating mistake in the last comprehensive zoning of the Property or change in the character of the neighborhood of the Property since the last comprehensive zoning. If this burden is met, the Board is permitted, but not compelled to grant the rezoning request.

2. Petitioner relied on alleged mistake in the 2004 Comprehensive Zoning as its justification for rezoning in this case.

3. There is sufficient evidence in the record demonstrating mistake in the 2004 Comprehensive Zoning of the Property to the R-20 District, as identified in the Technical Staff Report of DPZ and the Board's Findings of Fact, to overcome the strong presumption of correctness attached to that comprehensive zoning.

4. Petitioner has met the onerous burden of proving strong evidence of mistake in the 2004 Comprehensive Zoning of the Property sufficient enough to permit the requested rezoning of the property to B-1, as provided in the Board's Findings of Fact.

5. Petitioner has presented sufficient evidence for the Board to conclude that the appropriate zoning category for the Property is the B-1 Zoning District as set forth in the Board's Findings of Fact. Accordingly, the Board concludes that B-1 is the most appropriate zoning for the Property.

6. For reasons stated in the above Findings of Fact, the Board concludes that additional requirements are necessary to ensure that Petitioner's use of the Property is compatible with surrounding residential uses. The Board, therefore, imposes the following

additional requirements on documented site plans A and B pursuant to Section 100.G.2.e. of the Regulations:


- a. Petitioner shall develop a landscaping plan that includes plantings and provides buffering for adjacent residentially-zoned and improved land;
- b. Noise generated by speakers for drive-through service lanes shall not be audible from improved residentially-zoned land;
- c. All lights must be directed down and away from improved residentially zoned land; and
- d. To the extent consistent with other laws and regulations, Petitioner shall provide a buffer of 150 feet long and fifteen feet wide consisting of shade and evergreen trees, beginning on the northwest corner of the Property and along Parcel 777, which is improved with a community swimming pool.

7. The Board concludes that documented site plans A and B, subject to and supplemented with the additional requirements set forth above, satisfy all of the criteria set forth in Section 100.G.2.d of the Zoning Regulations. The Board, therefore, approves documented site plans A and B subject to and supplemented by the additional requirements imposed by the Board in this Decision and Order.

For the foregoing reasons, the Zoning Board of Howard County, on this 19th day of MARCH, 2012, hereby GRANTS Petitioner's request for rezoning of the Property from the R-20 to the B-1 Zoning District and GRANTS approval of documented site plans A and B subject to and supplemented by the additional requirements set forth herein.

ATTEST:

ZONING BOARD OF HOWARD COUNTY



Robin Regner
Administrative Assistant



Jennifer Terrasa, Chairperson


PREPARED BY HOWARD COUNTY
OFFICE OF LAW
MARGARET ANN NOLAN
COUNTY SOLICITOR


Calvin Ball, Vice Chairperson


Melissa S. Whipkey
Assistant County Solicitor


Greg Fox


Mary Kay Sigaty


Courtney Watson

ZB 1094M, Lewal Partnership

1/25/12

Exhibit List

Petitioner:

1. Order from Board of Appeals dated 2/13/03 for BA 99-22E, extending time period to obtain a bldg. permit for the special exception
2. Satellite photographs dated 2002 showing improvements made on property
3. Satellite photographs dated 2004 showing improvements made on property
- 4A-C. 3 photographs of property
5. Technical Staff Report – ZB 1084M, Forest Venture II, LLC. dated 11/24/09
6. Decision & Order – ZB 1084M, Forest Venture II, LLC. dated 7/2/10
7. Entire Route 40 Enhancement Study, Dec. 2004
8. Copies of site development plan – Forest Green – approved in 1084M
9. Color rendering showing elevations of building one and materials
10. Color rendering - Smaller building (bldg. two) showing elevations and materials
11. Color rendering of smaller building two – illustrating abundant landscaping
12. Color rendering - perspective showing larger building one
13. Photographs showing various plant materials, dumpster enclosure and lighting
14. Forest conservation recorded plat dated 12/2/02

Zoning Counsel :

1. Google map – aerial of area
2. Zoning Board D&O for ZB 847M, Salvatore Caltabiano, dated 2/24/88 - referenced in TSR